IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.1492 OF 2005

Sadashiv Narayan Kenjale
since deceased through LRs
1A. Mathurabai S.Kenjale & Ors. .. Appellants.
Vs.
Sarubai Shripati Kenjale & Anr. .. Respondents.

Mr.Dilip Bodake for the appellants.
Mr.Umesh Mankapure for respondent nos.1 and 2.

CORAM : D.B.BHOSALE, J.

DATED : 27TH FEBRUARY, 2007

P.C.:

. Heard learned counsel for the appellants.

2. This second appeal is directed against the concurrent judgments of the courts below by which the suit filed by the respondents-plaintiffs for partition and separate possession of their share in the joint family properties stands partly decreed. The plaintiffs are the heirs of Shripati. The appellants-defendants represent the branches of Ganapati and Sadashiv, the brothers of Shripati. Ganapati, Shripati, Sadashiv are sons of Narayan. The defendants had taken specific plea that there was partition in 1958 between Narayan, Ganapati, Shripati and Sadashiv and all the four were given equal share

and since then they are in separate possession of their shares including the plaintiffs, who represent Shripati's branch. Plaintiff no.1 is a widow of Shripati and plaintiff no.2 is their daughter. The case of the defendants that there was earlier partition in 1958 held to be proved by both the courts below. After the said partition Narayan died in 1973 and in view thereof the courts below have decreed the suit in respect of the share of Narayan in 1958 partition and granted 1/3rd share each in his share to his three sons, namely, Ganapati, Shripati and Sadashiv. Mr.Bodake, learned counsel for the appellants vehemently submitted that in absence of a specific prayer in the plaint seeking possession of the 1/3rd share in the share of Narayan and in the absence of evidence in support thereof the courts below have committed grave error of law in awarding 1/3rd share in favour of the plaintiff from the share of Narayan granted in 1958 partition. He further submitted that in any case the plaintiffs being women are not entitled to seek partition of the dwelling house property as provided under section 23 of the Hindu Succession Act. The first submission of Mr.Bodake is devoid of merits. I perused a copy of the plaint. It was a suit for general partition. Merely because the case of the defendants of earlier partition is upheld does not mean that the courts

below were wrong in decreeing the suit and awarding the 1/3rd share to all the three branches from the share of Narayan, who died in 1973. I do not find any illegality committed by the courts below in awarding 1/3rd share out of the share of Narayan. Insofar as the second submission of Mr.Bodake based on section 23 of the Hindu Succession Act is concerned, the partition of the dwelling house will be made, in pursuance of the decree, only when male heirs choose to divide their respective shares therein. However, this shall not preclude the plaintiffs from seeking separate possession if the house property has already been partitioned between three branches of the three sons of Narayan. In the circumstances this appeal fails and dismissed as such.

(D.B.Bhosale, J.)